

JULY 16, 1766.

Unto the Right Honourable, the Lords of Council and Session,

T H E

PETITION of *John Din*, Portioner of *Easter Craigannet*,

Humbly sheweth,

THAT in a Process, brought at the Instance of *David Modrel* of *Muir-mill*, as deriving Right from *William Maclay*, Son and Heir of *Andrew Maclay*, Portioner of *Easter Craigannet*, by whom these Lands, otherways called *Glendales*, were disposed to *John Liddel*, your Petitioner's Great-grand-father, upon the 14th Day of *November* 1737, against your Petitioner, concluding, to make Compt and Reckoning to the Pursuer of the Rents of the said Lands, intromitted with by him and his Predecessors, since the said *John Liddel*'s Entry thereto; and for having the Defender, your Petitioner, decerned, upon the Pursuer's making Payment to him of any Balance that should be ascertained to be still due of the Debts, in Security whereof that Disposition was granted, to discharge the said Debts, and renounce in his Favours, all Right he could pretend to the foresaid Lands, which ought to be declared lawfully to belong to him. The Lord *Auchinleck*, Ordinary in the Cause, after an Accompt had been given in by the Pursuer, of what he alledged was the true Rent of these Lands; a Condescendence given in for your Petitioner, the Defender, of what was alledged on his Part to be the Rent thereof; a Proof allowed of the Facts averred by both Parties; and after that Proof had been led, and their different Claims stated in Memorials, upon the 20th of *December* last, pronounced the following Interlocutor: "The Lord Ordinary having considered the mutual Memorials, Writs produced, and Testimonies of the Witnesses, finds, from the Tenor of the Disposition granted by *Andrew Maclay* to *John Liddel*, joined with the Amount of the Price, not being quite twenty Years Purchase, in the Year 1737, there is sufficient Evidence that *Andrew Maclay* did not intend to make a Sale of his Lands, but only to obtain a Delay of Diligence from *John Liddel*, his Creditor; and, therefore, that the Clause, by which the Lands are declared to be irredeemable, in case *Maclay* did not pay up this Debt to *Liddel*, within the Time limited, is to be considered as penal, and that it is competent to the Pursuer, as in Right of *Maclay*, to redeem the Lands, upon Payment of the Sum truly due, after the Intromissions had by the Defender and his Predecessors."

That of this Interlocutor your Petitioner, the Defender, having complained to the Lord Ordinary by a Representation, his Lordship was pleased, upon the 13th of *February* last, upon considering that Representation, with the Answers thereto, to adhere to the former Interlocutor, and to refuse the Desire of the Representation. Whereupon, your Petitioner, having reclaimed to your Lordships, you were pleased, upon the 4th of *July* current, upon advising that Petition, with the Answers thereto, "To refuse the Desire of the Petition, and to adhere to the Interlocutor of the Lord Ordinary reclaimed against."

That though your Petitioner readily acquiesces in that Part of your Lordships Judgment, whereby these Lands of *Craigannet* are found still to be redeemable from him, yet, as by the Interlocutor of the Lord Ordinary, simply adhered to by your Lordships, it is found competent to the Pursuer, to redeem the Lands, upon Payment of the Sum truly due, after discounting the Intromissions had by the Defender and his Predecessors, the Consequence whereof is, that he will be involved in a tedious Compt and Reckoning, in which it will be in a great measure impossible for him to prove the many Losses his Predecessors have suffered by bankrupt Tenants, Reparations of Houses, and other Articles of that Nature; he humbly begs leave again to submit the Case to your Lordships Consideration, hoping, so far to obtain an Alteration of the Judgment given, that the Lands shall be only found redeemable, upon Payment of the full Sums that were payable at *Martimas* 1742, at which Period, in case of Not-redemption, the Lands were declared irredeemable, whereby, your Petitioner, if he prevail, will be relieved from a troublesome Accompting since that Time.

What then your Petitioner humbly submits to your Lordships Consideration upon this Head, is, in the first Place, That, in his humble Apprehension, however the Right granted in the Year 1737, by *Andrew Maclay* to *John Liddel*, his Predecessor, was originally a Right in Security, redeemable upon Payment of the Sums therein

therein mentioned, at any Time before *Martinmas* 1742; and, however, your Lordships have found the same still redeemable, after the Lapse of that Term, yet, with great Submission, there does not appear to be sufficient Ground to oblige your Petitioner to compt for his Intrusions after that Time.

That your Lordships will please observe, that by that Deed it is expressly provided, "That in case the said *Andrew Macclay*, or his forefairs, should fail to redeem these Lands within the Space, (that is before *Martinmas* 1742) and in Manner therein mentioned, that the Lands should be sold, and *simpliciter* disposed to, and in favours of, the said *John Liddel* and his forefairs, heritably and irredeemably, without any Manner of Reversion, Redemption, or Regress, or Necessity of any Declarator whatever to follow thereupon, reserving a Life-rent to the Granter's Mother *Janet Adam*," the said *John Liddel* being bound, in case the Lands should fall absolutely and irredeemably to him, to pay an additional Debt of 600 Merks to *Margaret Provan*, besides those, in security whereof the Right was granted, which Debts all together are declared, in the Event of that Redemption, to be the full and adequate Price and Value of the Subject thereby disposed.

That this Deed contains an Obligation to invest, a Procuratory of Resignation, and a Precept of Sasine, all which Clauses expressly bear, that Deed to be granted under Reversion, at or betwixt and the foresaid Term of *Martinmas* 1742, and, failing of such Reversion heritably and irredeemably, in all Time thereafter. It likewise contains an Assignment to Mails and Duties, in the following Words: "I hereby, with Consent foresaid, make, constitute, and ordain, the said *John Liddel* and his forefairs, my Cessioners and Assignees, in, and to, as much of the first, best, and readiest of the Mails, Farms, and Duties of the foresaid Lands, forth, and from the Term of *Martinmas* 1737, till the Term of *Martinmas* 1742, as will satisfy and pay the Annualrent of the above accumulated Sum of 1600 l. the said *John Liddel* always allowing me, notwithstanding of this Right, to uplift, during the said Space, what Rents may be due of the said Lands, more than the said Annualrent, *Margaret Provan's* Annualrent, and the said *Janet Adam's* Life-rent, and in, and to, the haill Rents, Mails, and Duties thereof, in all Time thereafter, in case of not Redemption betwixt and that Term."

From these Clauses, then, of that Deed, it is humbly submitted to your Lordships, if it does not sufficiently appear, either that it was the Meaning of Parties, that, in case of not Redemption before *Martinmas* 1742, the Right should become irredeemable, or, at least, that it should then become of the Nature of a proper Wadset. In the first of these Views, it can only be upon equitable Considerations, contrary to the Principles of strict Law, and contrary to the ancient Practice, that your Lordships have still found the Lands redeemable; and it is believed that, in such Cases, you have never gone so far as to find the Possessor accountable for the interim Rents; and, in the other View, taking the Right to be of the Nature of a proper Wadset, there seems to be no Ground to subject your Petitioner to account for the Rents subsequent to *Martinmas* 1742, when it then became such.

But, in the *second place*, your Petitioner humbly submits to the Court, if he is not to be considered, at least, as a *bona fide* Possessor, so as not to be accountable for those Rents: For your Lordships will please know, that *John Liddel*, in favours of whom that Disposition was granted, having disposed these Lands to *John Din*, his Grandson, your Petitioner's Father, he, in the End of the Year 1743, obtained a Charter, from the Superior of these Lands, heritably and irredeemably, mentioning, in the *Quequidem*, that these Lands had been disposed by *Andrew Macclay*, redeemable before *Martinmas* 1742, and irredeemably, failing such Redemption; and likewise your Petitioner himself, who is still under Age, when about a Twelve-month old, in the Year 1750, obtained a Precept of *clare constat*, wherein there is no Mention of any Reversion. These Circumstances considered, it is humbly submitted to the Court, if the Petitioner's Father was not *in bona fide* to consider himself as irredeemable Proprietor of these Lands, and if your Petitioner's Tutors had not likewise good Reason to consider him in the same Light; and what a Hardship it will now be upon him to enter into a Count and Reckoning for such a Course of Time, after the Rents have been disposed upon for so many Years by his Father, as absolute Proprietor, and thereafter, by your Petitioner's Tutors and Curators, who likewise considered him in that View, and have laid out Money on his Aliment and Education accordingly.

May it therefore please your Lordships so far to alter the Interlocutor above recited, as to find your Petitioner is not accountable for the Rents of the above mentioned Lands since *Martinmas* 1742.

According to Justice, &c.

DAVID GRÆME.